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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

TANYA GERSH,

Plaintiff,

vs.

ANDREW ANGLIN,

Defendant.

No. CR-17-50-M-DLC-JCL

Defendant's Motion to
Dismiss

BEFORE THE HONORABLE JEREMIAH C. LYNCH
UNITED STATES MAGISTRATE JUDGE
FOR THE DISTRICT OF MONTANA

Russell Smith Federal Courthouse
201 East Broadway
Missoula, Montana 59802

Tuesday, April 3, 2018
1:39 p.m. to 2:57 p.m.

Proceedings recorded by machine shorthand
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1 TUESDAY, APRIL 3, 2018

2 Whereupon, the following proceedings were had and entered
3 of record in open court, with counsel present:

4 THE COURT: Good afternoon, please be seated.

01:39:31 5 This is the time set for argument in *Gersh versus*
6 *Anglin*, Civil Cause 17-50, Missoula.

7 We're here today to address the defendant Anglin's
8 Rule 12(b)(6) motion seeking dismissal of plaintiff Gersh's
9 Complaint for failure to state a claim upon which relief can
01:39:54 10 be granted.

11 I'll begin by asking counsel for Ms. Gersh to identify
12 themselves for the benefit of the court reporter.

13 MR. DINIELLI: Good afternoon, Your Honor. David
14 Dinielli of the Southern Poverty Law Center, for the
01:40:05 15 plaintiff.

16 MR. MORRISON: John Morrison, Morrison Sherwood
17 Wilson Deola, for the plaintiff as well.

18 THE COURT: Good afternoon.

19 MR. RANDAZZA: Good afternoon, Your Honor. Marc
01:40:14 20 Randazza on behalf of the defense.

21 THE COURT: Good afternoon.

22 MR. STEVENSON: Good afternoon, Your Honor. Mat
23 Stevenson on behalf of the defendant.

24 THE COURT: All right, good afternoon to all of you.
01:40:21 25 I intend here to give each side 30 minutes of argument. If

1 the defendant as the movant wishes to reserve some time for
2 a rebuttal, advise me of that. Do you wish to do that?

3 MR. RANDAZZA: Yes, Your Honor, we would like to
4 reserve 15 minutes for rebuttal.

01:40:41

5 THE COURT: All right. That being said, then I will
6 hear from--I take it, Mr. Randazza, you will be arguing
7 today?

8 MR. RANDAZZA: Yes, thank you, Your Honor.

9 THE COURT: All right, I'll hear from you first.

01:40:56

10 MR. RANDAZZA: Your Honor, today I'm not here on
11 behalf of the principle that I like what my client has to
12 say. I do not. I abhor what my client has to say. But I
13 am here defending the principle that he has the right to say
14 it without intervention by the government or without tort
15 liability.

01:41:40

16 Justice Roberts said in *Snyder v. Phelps*, "Speech is
17 powerful. It can stir people to action, move them to tears
18 of both joy and sorrow, and--as it did here--inflict great
19 pain. But we cannot react to that pain by punishing the
20 speaker because we as a nation have chosen a different
21 course--to protect even hurtful speech on public issues to
22 ensure that we do not stifle public debate."

01:42:00

23 THE COURT: Let me interrupt for a moment. Forgive
24 me. But when you make that statement you are talking about,
01:42:19 25 obviously, Mr. Anglin, because we have this difference

1 between the people who actually directly contacted
2 Ms. Gersh--

3 MR. RANDAZZA: Yes.

01:42:32

4 THE COURT: --and/or her family versus Mr. Anglin,
5 what he put on his website. And you are referring in this
6 instance to Mr. Anglin, correct?

01:42:50

7 MR. RANDAZZA: I am, Your Honor. I do not represent
8 those parties. However, since Your Honor asked, I might
9 even say that were I hypothetically here defending those
10 parties, even their speech I believe would be protected.

01:43:12

11 However when it comes to my client, there is this
12 attenuation. My client did publish articles. My client
13 published exhortations to action. My client did express
14 himself on this matter of public concern and then these
15 other people reacted negatively.

01:43:33

16 Now, we have a sample throughout the Complaint which, as
17 I read it, I am filled with emotional sympathy for
18 Ms. Gersh. I would not wish to suffer what she suffered. I
19 empathize with her. However, even that, how can my client
20 be held responsible for what his readers might read and how
21 they might react? There were, by their count, I
22 believe--and forgive me if I'm wrong, correct me if I'm
23 wrong--hundreds of messages.

01:43:49

24 THE COURT: 700, I'm told.

25 MR. RANDAZZA: Yes. And we have a sample of the

1 worst of the worst, none of which I find to be emotionally
2 or psychologically defensible, but I find them to be legally
3 so. Some of them may be extremely cruel, but none of them
4 rise to the level of a true threat. There is no threat to
01:44:08 5 violence in a way that the speaker would control the means
6 of that violence or harm.

7 But then if I step back from those words that I do not
8 stand here today to defend, I don't stand here to defend
9 those speakers, but if we step back to what Mr. Anglin did,
01:44:27 10 it is really most--the case that I found to be most
11 analogous was the *Claiborne Hardware* case, where in that
12 case, and as I read it, it was--you know, if I were--if you
13 were to hire me as your clerk, I would probably just start
14 with that and start replacing names and nouns, because in
01:44:48 15 that case we had an impassioned plea for a change of social
16 circumstances.

17 THE COURT: Tell me how, in your view, how
18 *Claiborne*, we're going to be talking about that, ties in
19 with the captive audience doctrine.

01:45:08 20 And the reason I ask that is this: We all know the
21 court identified three ways in which an individual such as,
22 in that case Mr. Evers but in this case Mr. Anglin,
23 hypothetically could be held liable for the tortious acts of
24 the people who followed his speech, we'll say.

01:45:25 25 MR. RANDAZZA: Correct.

1 THE COURT: And the first one that the court
2 identified and seems important here is the one that--the
3 question before the Court in *Claiborne* was Mr. Evers
4 authorized, directed or ratified specific tortious activity.
01:45:41 5 Okay?

6 MR. RANDAZZA: Yes, Your Honor.

7 THE COURT: When you tell me about the captive
8 audience in *Claiborne*, I want you to tell me--I understand
9 that there were numerous articles written by Mr. Anglin. I
01:45:54 10 think some of the messages, if I'll call them that, to
11 Ms. Gersh and/or her family occurred after the first
12 article, first or second article written, but that he
13 continued to write articles with the same theme.

14 Those subsequent articles, do they constitute a
01:46:14 15 ratification, authorization, direction?

16 MR. RANDAZZA: I don't believe so, Your Honor.

17 THE COURT: All right, tell me why.

18 MR. RANDAZZA: Because if he had--he could continue
19 to extoll the virtues of his beliefs, the beliefs and the
01:46:27 20 tenets of national socialism. He can continue to extoll his
21 beliefs of racism, his anti-Semitic views. Just because
22 somebody reacted negatively to that, I don't believe that
23 that creates any obligation on his part to stop. No legal
24 obligation.

01:46:46 25 THE COURT: But didn't he--the tenor of his articles

1 suggest at the very least that they direct these--their
2 opinions, as I think he used the term opinions, directly
3 into Ms. Gersh's life, so to speak? Maybe not necessarily
4 her home. The plaintiff takes the position that is to be
01:47:08 5 considered part of her home, her e-mail accounts or text
6 messaging, et cetera?

7 MR. RANDAZZA: The plaintiff does take that
8 position. I respectfully disagree, Your Honor.

9 We look at the captive audience cases. One of the most
01:47:23 10 key captive audience cases that we might look to would be
11 *Snyder v. Phelps*. And I can't think of anybody more captive
12 than a father at his son's funeral. However, even in that
13 case the Westboro Baptist Church was not found to be
14 addressing a captive audience.

01:47:42 15 THE COURT: Well, that occurred on public property,
16 did it not?

17 MR. RANDAZZA: Yes, Your Honor. And had this--had
18 these protests, for example, been directed to occur outside
19 of her home, there I'm citing the *Frisby v. Schultz* would
01:47:59 20 say that the government may prohibit picketing at her
21 residence.

22 There are cases that say that if there were phone calls
23 coming into her house on a constant basis, that might be
24 something in a commercial speech context which the
01:48:14 25 government could intervene in.

1 However, I think this is different because this is not
2 commercial mailers coming to a house. For example, there is
3 a good case that they cite called *520 South Michigan Avenue*
4 *Associates, Limited v. Unite Here Local*, a 7th Circuit case.
01:48:35 5 And it's cited specifically for this line:

6 "The freedom of an unwilling listener to avert one's
7 eyes or ears is considerably lessened when she is required,"
8 and then there is an ellipsis, "to check her phone
9 messages." However, the omitted word in this quote is "to
01:48:53 10 be on the job and check her phone messages." So this is
11 different.

12 I also think that technology has changed the fact of
13 back when some of these captive audience cases with respect
14 to phone calls were written, we didn't have the ability to
01:49:07 15 simply block a number. We don't have to turn your phone off
16 completely now in order to avoid unwanted phone calls. I
17 get them constantly. Block the number and we're done.
18 E-mails--

19 THE COURT: Isn't the--if there's 700 calls coming,
01:49:22 20 for instance, and you have to block 700 calls, wouldn't or
21 couldn't someone find that to be intolerable within the
22 purview of the captive audience doctrine?

23 MR. RANDAZZA: I believe if my client were manning a
24 phone bank or directing people to make these direct calls to
01:49:41 25 them again and again, it might be. However, Your Honor, I

1 don't think so, because Ms. Gersh herself has been quoted as
2 saying that she enjoyed the calls of support that she got.

3 So what we're doing here is we're going to make a
4 determination that the calls of support which she received,
01:49:58 5 which outnumbered the calls of criticism. And that makes me
6 happy to hear that the mail that she got supporting her
7 outnumbered the hate mail.

8 Are we going to say that the bad phone calls and the bad
9 speech, we're going to find that to be tortious but we're
01:50:17 10 not going to find the mail that is in support to be
11 tortious? That, of course, is a viewpoint discrimination
12 determination.

13 So I do not believe, Your Honor, that even getting a lot
14 of phone calls when you are involved in a matter of public
01:50:31 15 concern is going to be something that you can be held
16 liable--that you can hold another person liable for, and
17 most certainly not the person who simply wrote an editorial,
18 or even 30 editorials, calling for action and calling for
19 someone to share their opinion.

01:50:47 20 THE COURT: Well, when you use the term public
21 concern, you are not suggesting to me that Ms. Gersh would
22 be considered a public figure?

23 MR. RANDAZZA: I would, Your Honor.

24 THE COURT: Okay.

01:50:56 25 MR. RANDAZZA: It is our position--

1 THE COURT: On what basis?

2 MR. RANDAZZA: Well, Ms. Gersh did interject herself
3 into a public controversy. The issue of Richard Spencer's
4 mother living in Whitefish is a matter of public concern.

01:51:08

5 THE COURT: But didn't Ms. Spencer contact Ms. Gersh
6 in the first instance to act as her realtor?

7 MR. RANDAZZA: That is a matter of factual dispute,
8 Your Honor.

9 THE COURT: Okay.

01:51:19

10 MR. RANDAZZA: I look at the--whether or not that
11 happened, though, I don't think is legally relevant to
12 determining whether or not Ms. Gersh interjected herself
13 into a matter of public concern either voluntarily or
14 involuntarily.

01:51:32

15 THE COURT: And when you tell me she injected
16 herself, that's based upon your conclusion that by
17 suggesting to Ms. Spencer that she sell her building and
18 transfer the proceeds to an entity of some kind, that that's
19 interjecting herself and, thus, she becomes a public figure,
20 because the Spencer potential march--by her son, the
21 potential march was a matter of public concern?

01:51:56

22 MR. RANDAZZA: Well, I think even before that, Your
23 Honor, if I'm recalling the allegations of the Complaint
24 with total recall.

01:52:11

25 The issue of Ms. Spencer living there even before there

1 was a planned march has been a matter of controversy.
2 Ms. Gersh even alleges that she's been part of a movement
3 to--I believe it's called "Hate Does Not Live Here." Even
4 that--I'm not saying she did something bad by joining that
01:52:30 5 group. In fact, that's a wonderful thing and that's her
6 First Amendment right. But I would say that given that this
7 is a public controversy, she is a limited purpose public
8 figure. I don't think she's a public figure for all
9 purposes, of course. She's not reached that level of
01:52:46 10 notoriety. But with respect to this issue, this debate, she
11 has joined a side of the debate and, thus, voluntarily
12 interjected herself into a larger public debate.

13 I can appreciate the fact that somebody new to the arena
14 of public debate might not appreciate just how far that
01:53:07 15 might go and just how far that swirl of public attention
16 could expand. But expand it did, and that is not something
17 that my client did.

18 You know, there is a--in some of your questions, Your
19 Honor, there is this thread where, you know, I could see as
01:53:27 20 my client starts writing about her and that is the thing
21 that brings her into the public debate, we may not have that
22 shelter. You can't make someone a public figure and then
23 claim now they are a public figure, so I should have a lower
24 level of proof. But this was prior to my client's writing
01:53:44 25 that she did step into that arena.

1 THE COURT: Well, what did she do to publish her
2 opinion, so to speak, in the public arena?

3 MR. RANDAZZA: Your Honor, I think that that's--
4 that's not--that's not the inquiry that I think gets to the
01:54:01 5 heart of the issue.

6 I think that the heart of the issue is when you do have
7 a person who is drawing controversy, Ms. Spencer, and you--
8 even if--let's accept the state of the facts as they present
9 it--Ms. Spencer called her, not vice versa. Even then, if I
01:54:22 10 got a call from--well, heck, when I got a call from
11 Mr. Anglin, I understood that if I took that call and I
12 became involved with him in any way, that might lead me to
13 be a limited purpose public figure.

14 THE COURT: So it's your position that by Ms. Gersh
01:54:41 15 having a conversation, arguably a private conversation with
16 Ms. Spencer about the sale of her building, and then
17 Ms. Spencer, to my understanding, conveyed that to her son
18 which led to this--Mr. Anglin doing whatever he did on his
19 website, that that makes Ms. Gersh a public figure?

01:55:03 20 MR. RANDAZZA: A limited purpose public figure, yes.

21 THE COURT: Well, limited purpose, but the point
22 being, a public figure.

23 MR. RANDAZZA: Yes, Your Honor. And additionally
24 let's not forget it was not just a phone call to a realtor.

01:55:15 25 This was a phone call to a realtor who was an activist in

1 this organization. And it was also--part of that
2 conversation was a request that Ms. Spencer publicly
3 denounce her son. Now, she chose not to do that. But I
4 think if I were to call the "Daily Stormer" and ask them to
01:55:35 5 publish an editorial denouncing Hermann Göring's history,
6 then they decided to publish something instead about me for
7 not being sufficiently sympathetic to their views, yes, I
8 would have interjected myself.

9 THE COURT: Was the suggestion to publicly denounce
01:55:54 10 Mr. Spencer, her son, was that professional advice in order
11 to allow her to maintain her building at acceptable rental
12 levels? We know what the background is.

13 MR. RANDAZZA: Right. That is not in the Complaint,
14 Your Honor. And if it is, then I missed that detail.

01:56:15 15 But if it were a--if it was saying that you should
16 denounce your son so I could sell this place better--

17 THE COURT: Wasn't the issue it was a concern she
18 couldn't maintain her rental levels because if the march
19 occurs, that puts a bad light on her and her building? Like
01:56:33 20 it or not, that could happen?

21 MR. RANDAZZA: Perhaps.

22 THE COURT: So it's your position Ms. Gersh didn't
23 make that suggestion to her for purposes of assisting her as
24 her real estate agent, but for purposes of advancing the
01:56:49 25 other group she was involved with?

1 MR. RANDAZZA: This is how I see it in the
2 Complaint, but let's look at the alternate view.

3 Even if it were simply to make this a more palatable
4 sale or rental, it's still a big matter of public
01:57:04 5 controversy. In fact, by definition if we look at that
6 scenario and accept that as the true state of affairs, if
7 I'm acting as a real estate agent and I say you need to make
8 this public statement because your building's going to be
9 hard to rent or sell absent that public statement, doesn't
01:57:22 10 that presuppose that there is already a public controversy?
11 It accepts the fact that there is already a public
12 controversy. So we're already in the public controversy
13 arena no matter which way we go on that factual note, Your
14 Honor.

01:57:37 15 THE COURT: All right. I probably had you digress
16 from your argument. Get back if you would, please, to the
17 captive audience, how that applies here, if it does.

18 MR. RANDAZZA: Yes. Your Honor, I do not believe
19 that it does. If we look at other captive audience cases,
01:57:53 20 for example, *Bland v. Fessler* is the Ninth Circuit one that
21 I alluded to earlier. Now, that cited--a 1996 case is cited
22 for the proposition that turning off ringers forces people
23 into isolation. Screening would clutter the machines of
24 those who can afford them. Hanging up does not always allow
01:58:13 25 the called party to tell the caller not to call again.

1 But here in that case it involved a California law that
2 required commercial auto dialers to use a live operator to
3 obtain the called party's consent to listen to the
4 pre-recorded messages. That's different than simply saying
01:58:32 5 phone calls make you a captive audience.

6 The omitted language that poor people cannot afford
7 answering machines, which was omitted probably because of
8 the fact that the technology is very different, there are
9 many ways in 2017 to reduce the number of unwanted calls
01:58:49 10 using caller ID, blocking certain numbers.

11 I understand that that is inconvenient, but we lose--as
12 we step into the public light, we step into matters of
13 public dispute, we lose many conveniences that those people
14 who are--have the privilege of living an anonymous
01:59:08 15 lifestyle, they have many privileges that you, yourself,
16 Your Honor, have lost the day you took your commission.

17 THE COURT: True, but let me have you set aside for
18 a moment, because the plaintiff doesn't agree with you and I
19 may not necessarily agree with you, that she's a public
01:59:23 20 figure, Ms. Gersh.

21 MR. RANDAZZA: Yes, Your Honor.

22 THE COURT: Limited public figure. And then talk to
23 me about the captive audience and how it applies if we make
24 that assumption.

01:59:33 25 MR. RANDAZZA: Even if she's not a public figure,

1 this is still a matter of public concern. So the matter and
2 the person, each one of those can lift us to the fact that
3 this is a matter of public debate.

4 So even if you decide she's not a public figure or
01:59:50 5 wasn't a public figure at the time, this is still a matter
6 of public concern. The person at the center of the matter
7 of public concern is going to necessarily be subject to
8 certain verbal and slings and arrows and invasions of
9 privacy that the rest of us would prefer not to enjoy.

02:00:11 10 THE COURT: Well, what I was hoping you would talk
11 about a bit is, you make the statement in your brief that
12 social media, e-mail, telephone messages are directed to a
13 distant cloud, computer servers, to which the individual
14 must affirmatively reach out to acquire.

02:00:30 15 That's an alternative argument, I take it, to your
16 position that the captive audience doctrine does not apply
17 here. Explain that to me.

18 MR. RANDAZZA: Well, Your Honor, if we were to say
19 that getting an outrageous amount of physical mail, if this
02:00:47 20 case were taking place in the '80s and somebody was just
21 getting thousands of postcards a day, perhaps distributed by
22 my client who said, here, fill these out and send them in;
23 or, here's a stack of letters, take them and sign them, they
24 are pre-addressed, that might be another story if she was
02:01:06 25 simply inundated with packages that she would have to then

1 sift through and figure out what's the electric bill and
2 what is this letter criticizing her.

3 But when you open up your e-mail box, you do have to
4 open that e-mail. You see a subject line. I don't think
02:01:22 5 that there is any--I don't think you can analogously say
6 that this is a captive audience simply because they get a
7 lot of e-mails.

8 THE COURT: Well, the Supreme Court has said you are
9 a captive audience if there's people picketing outside your
02:01:38 10 home, correct?

11 MR. RANDAZZA: Yes, Your Honor. Or you can be.

12 THE COURT: You can be. And it's based upon the
13 right of privacy of the homeowner, correct, in that case?

14 MR. RANDAZZA: Yes, Your Honor.

02:01:49 15 THE COURT: And a right of privacy in today's
16 digital world is quite different than it was when that case
17 was decided, correct?

18 MR. RANDAZZA: Unfortunately, greatly diminished,
19 Your Honor.

02:02:00 20 THE COURT: Well, true, and I know where you are
21 going with that. But we do have an expectation of privacy,
22 I believe, at least in many instances, to our e-mail
23 accounts. Would you agree with that? If I don't publish
24 them to the world.

02:02:13 25 MR. RANDAZZA: Yes, if my client were hacking into

1 her e-mail account and--

2 THE COURT: Well, I'm talking about Ms. Gersh. Or
3 anybody. Let's set Ms. Gersh aside.

02:02:26

4 If they have an e-mail account that they don't publish
5 to the world but to a select few people, that person has an
6 expectation of privacy in that e-mail account. Would you
7 agree with that?

8 MR. RANDAZZA: I'm not sure I would, Your Honor.

9 THE COURT: And why is that?

02:02:36

10 MR. RANDAZZA: Because the mere fact of your e-mail
11 address itself, I don't know that that would be a private
12 matter if we're looking at the invasion of privacy tort that
13 they seem to indicate here. However, it's my understanding
14 that this e-mail address was previously published.

02:02:54

15 Accordingly--if she had a secret e-mail address that nobody
16 knew except--

17 THE COURT: Well, that's where my question is
18 headed.

02:03:05

19 MR. RANDAZZA: I have a secret e-mail address that
20 only my closest family members know because that way I know
21 when that one's lit up, I want to look at that. Perhaps if
22 somebody discovered what that secret e-mail was that I've
23 only given to four people and they publish that, that might
24 be the case. But that's not the case here.

02:03:24

25 THE COURT: Okay. Then answer me this question,

1 too. These--it's doxing, as I guess the term is now, where
2 the cell phone numbers, or landlines if anybody has those,
3 e-mails and so forth are put on a website. That's what
4 Mr. Anglin did, correct?

02:03:44

5 MR. RANDAZZA: Yes.

6 THE COURT: And Twitter accounts, including the
7 Twitter account of Ms. Gersh's son?

8 MR. RANDAZZA: Yes, Your Honor.

02:03:53

9 THE COURT: Was all of that material--all of those
10 modes of communication, I should say, were they all public?

11 MR. RANDAZZA: They were public, Your Honor.

12 THE COURT: So there was not--nobody had to go
13 surreptitiously, I'll use that term, to find any of those
14 communication media?

02:04:07

15 MR. RANDAZZA: That is neither alleged or alluded
16 to.

17 THE COURT: I'm asking what your understanding is.

18 MR. RANDAZZA: That is my understanding, that no.

02:04:18

19 Therefore, she has a public address listed on her real
20 estate broker's website. Even her son's Twitter account.
21 And it's personally offensive to me that somebody would say,
22 here's a minor's Twitter account, direct your attention
23 toward it. But it was not a private matter. It's not
24 something that's hidden. And, therefore, while we may all
02:04:38 25 sit here and perhaps--I would imagine nobody in this

1 courtroom disagrees with me that as a matter of poor taste,
2 that is not the test under our constitution.

3 THE COURT: All right. You've used not all of your
4 time but I just want you to wrap up answering this question.
02:04:57 5 It goes back to the direct, authorize or ratify question I
6 asked you earlier.

7 What in your mind does it take for a person who
8 establishes a website that ends up in a troll storm to an
9 individual, what would it take in your mind to say that
02:05:14 10 person directed, authorized or ratified? What is the Court
11 to look to in terms of making that determination?

12 MR. RANDAZZA: A couple of factors, Your Honor.
13 One, what is it that they are inciting? So when we look at,
14 for example, the *NAACP v. Claiborne Hardware* case, in that
02:05:34 15 case even the speech itself, when the gentleman from the
16 NAACP made the speech, he actually said people are going to
17 get their skulls cracked if they cross the line. I'm
18 paraphrasing, but there was an actual exhortation to
19 violence, but not imminent violence.

02:05:50 20 And I think what we need to look to is, it needs to be
21 incitement to imminent lawless action.

22 THE COURT: Well, I'm going to ask the plaintiff's
23 counsel, and I believe this is their position, that a person
24 can be held regardless of whether it's incitement. In other
02:06:10 25 words, they are taking the position that the substance of

1 the communication doesn't necessarily have to be incitement
2 or be inciteful, in other words. But you are trying to
3 limit it to that. Is that your position that it has to be a
4 call to incitement?

02:06:27

5 MR. RANDAZZA: It has to be a call to something
6 tortious. Otherwise, if I were to--if I were not involved
7 in this case, I might exhort people to send her letters of
8 support. So you are looking at the content of what he had
9 to say. And so if we look at it in these--you know, these
10 charged terms like troll storm, well, what does troll storm
11 really mean?

02:06:43

12 THE COURT: Would sheer volume be sufficient?

13 MR. RANDAZZA: I don't think so, Your Honor.

14 THE COURT: But you understand that to be the
15 plaintiff's argument?

02:06:54

16 MR. RANDAZZA: I do. But, however, I would say that
17 if you even receive one image like what they put in their
18 Complaint, that would itself still be just as alarming, just
19 as much.

02:07:10

20 My client--I think it's important to say that my client
21 even made sure to tell everybody no threats of violence,
22 nothing illegal of any kind. The reason being, he even gave
23 his reason, but that gives them some kind of moral
24 authority.

02:07:26

25 Same thing as was in the *NAACP v. Claiborne Hardware*

1 case, in that speech, the discussion that we're going to
2 burn this down, we're going to crack people's skulls.

3 Now, rhetorical hyperbole? Probably. That's how the
4 court looked at it. But even then that's not a ratification
02:07:44 5 of the fact that there actually was physical violence in
6 that case.

7 THE COURT: Well, my point is there doesn't have to
8 be physical violence, does there?

9 MR. RANDAZZA: There has to be at least something
02:07:56 10 tortious, Your Honor. If it were simply my client
11 endorsing--

12 THE COURT: The breach of the receiver's, in this
13 case Ms. Gersh, peace of mind by getting bombarded with the
14 sheer volume of these e-mails, texts, whatever.

02:08:08 15 MR. RANDAZZA: If we were to--if this were to be the
16 case where that--that rule of law was designed and invented,
17 I think we would have a very deep chilling effect on
18 political activism and speech.

19 You know, it's very easy for, I think, all of us to
02:08:34 20 think that it's just awful when there is this sheer volume
21 of Nazi-inspired speech. But let's just change it to the
22 next activist, just because none of us want to see--I
23 presume nobody in this courtroom wants to see this activism
24 be successful. I would like to see my client's activism
02:08:55 25 defeated in the marketplace of ideas.

1 But if we think about communities in Pennsylvania where
2 everybody says let's send letters to the CEO of this company
3 that's engaged in fracking in our community; or, heck, if we
4 even have politicians who are too tolerant of bigotry or
02:09:12 5 racism, each--whatever the rule you lay down for the Nazi
6 here, you also lay down for the civil rights activist.

7 THE COURT: Oh, I understand completely.

8 MR. RANDAZZA: And I would be--I would find it far
9 more chilling than my walk off the airplane into Missoula
02:09:32 10 last night, and that was quite a shock for a guy from the
11 hot desert.

12 THE COURT: All right, thank you. I'm going to
13 reserve some time for you.

14 MR. RANDAZZA: Thank you, Your Honor.

02:09:46 15 THE COURT: For the plaintiff, Mr. Dinielli.

16 MR. DINIELLI: Thank you, Your Honor.

17 With the Court's indulgence I'll be addressing the First
18 Amendment issues generally and the torts. I would like to
19 allow my co-counsel, Mr. Morrison, to address the questions
02:10:19 20 relating to the Montana Anti-Intimidation Act.

21 THE COURT: All right. In fairness to you folks,
22 we're focused on the First Amendment questions we're dealing
23 with.

24 MR. DINIELLI: That's fine.

02:10:30 25 Your Honor, the defense here is asking for a First

1 Amendment right to launch an online targeted vicious attack
2 directed at an individual, designed to make her life hell,
3 effectuated essentially through private communications that
4 contribute nothing to the marketplace of ideas. This intent
02:10:52 5 is laid bare by the fact that the troll storm was directed
6 even at her own son, 13 years old.

7 I would like to set the stage a little bit for what I
8 think we're doing today here, Your Honor. We need to
9 remember that we're here on a 12(b)(6), a motion to dismiss.
02:11:08 10 Although we did not discuss this at length in our brief, the
11 same rules apply when someone raises a First Amendment
12 defense on 12(b)(6) as any other kind of defense or any
13 other kind of argument. First Amendment defense is an
14 affirmative defense. Many, many district courts have
02:11:25 15 delayed final decisions on First Amendment defenses until
16 the record is developed.

17 The colloquy, for example, relating to whether Ms. Gersh
18 is a limited public figure, whether any of the speech
19 addressed a public concern, I think essentially demonstrates
02:11:43 20 why that might be an appropriate approach here.

21 In order for the Court to grant the defense's motion
22 they would have to conclude that the allegations leave no
23 doubt but that the claims are barred.

24 The colloquy revealed that there are already potential
02:12:00 25 factual disputes relating to underlying facts that might

1 inform a discussion of, for example, whether she's a limited
2 public figure. So, for example, we heard Mr. Randazza say
3 that my client was affiliated with a group that is correctly
4 called "Love Lives Here". There are no such allegations.

02:12:20 5 There is an allegation that she heard a rumor about a
6 meeting that she did not attend. There is no allegation
7 that she was acting on their behalf, that she was a member,
8 or that she had any role in planning or being even able to
9 withhold the possibility of any kind of public march.

02:12:36 10 So to the extent that it matters, and we can get into
11 whether or not it does or not, whether she was a public
12 figure, the allegations are what matter, not Mr. Randazza's
13 argument and not--

14 THE COURT: I understand completely.

02:12:48 15 MR. DINIELLI: Thank you.

16 The second thing is that Mr. Randazza's argument appears
17 to begin with the premise that unless the Supreme Court has
18 already defined a, quote, exception to the First Amendment,
19 that any cause of action, tort or statutory, that is based
02:13:05 20 on words, is presumptively barred.

21 Again, that's not the proper approach. And the Ninth
22 Circuit in a 2013 case expressly rejected this approach and
23 confirmed that it's the duty of the court to look at the
24 record as a whole.

02:13:20 25 So what we're not doing here today, or on this motion,

1 is determining whether what Mr. Anglin and his followers did
2 fits within just the particular exceptions that Mr. Randazza
3 has cited. It doesn't matter if it was a true threat, for
4 example. It doesn't matter if it's incitement. What
02:13:39 5 matters is, looking at the record, whether there is a reason
6 to confer First Amendment protection to the language that
7 was used and we would obviously submit that it's not. But
8 even more important--

9 THE COURT: Well, focus upon--there's that jump, if
02:13:51 10 you will, to hold Mr. Anglin responsible versus the people
11 who communicated the statements, threats, et cetera, to
12 Ms. Gersh. Right? It's your position that he is
13 responsible.

14 MR. DINIELLI: Absolutely, Your Honor.

02:14:07 15 THE COURT: And it's your position that he is
16 responsible under the statements made, I take it, in the
17 *Claiborne* case?

18 MR. DINIELLI: That's exactly correct, Your Honor.

19 THE COURT: So tell me--

02:14:17 20 MR. DINIELLI: Two observations about that, if I
21 may.

22 THE COURT: Sure.

23 MR. DINIELLI: One is that we think that the
24 language that the court has addressed in the *Claiborne* case
02:14:25 25 describing the three ways in which that speech could have

1 given rise to liability, is the Supreme Court's confirmation
2 that specific direction of tortious activity is not
3 protected and can be the basis of liability.

4 In addition, Your Honor, we are relying on the
02:14:42 5 common-law principle that substantial assistance to the
6 commission of a tort makes the person liable in tort.

7 THE COURT: Even in the First Amendment context?

8 MR. DINIELLI: Absolutely, Your Honor.

9 THE COURT: Any authority for that?

02:14:54 10 MR. DINIELLI: Well, not specifically saying in the
11 First Amendment context.

12 THE COURT: I didn't think so.

13 MR. DINIELLI: But in Montana cases addressing both
14 invasion of privacy under the guise of intrusion into
02:15:09 15 seclusion and with respect to intentional infliction of
16 emotional distress.

17 THE COURT: I have no problem with that. But what
18 you are suggesting to me is that principle should apply in
19 the First Amendment context to hold Mr. Anglin responsible.

02:15:19 20 MR. DINIELLI: Well, there is no reason why it
21 should not, Your Honor. A tort is a tort unless there is a
22 First Amendment defense. If there is a First Amendment
23 defense to the tort which we say is the launching of a troll
24 storm which resulted in and was intended to cause harm, then
02:15:32 25 there is a First Amendment defense. I don't understand why

1 there would be a different result simply because someone is
2 alleged to have provided assistance under the common-law.

3 THE COURT: Well, isn't--in *Claiborne* itself, didn't
4 the court say even the suggestion of undertaking unlawful
02:15:48 5 activity, even violent activity, is in fact protected?

6 MR. DINIELLI: The court did describe the subject
7 speech at issue in that way. That is not what we are
8 alleging here. We are not alleging that Mr. Anglin
9 advocated for violence. We are alleging that he
02:16:07 10 specifically directed people to take specific actions, which
11 they did, and he knew what they would do.

12 THE COURT: Understood. But it's your position, if
13 I understand it correctly, going back to the terminology
14 "sheer volume," that the sheer volume of calls that may have
02:16:21 15 been made, some 700 according to the allegations, that is,
16 quote, intolerable within the meaning of the Supreme Court's
17 discussion of captive audience to state a claim. Am I right
18 on that?

19 MR. DINIELLI: Well, I don't think we need the
02:16:37 20 captive audience argument in order to get where we want to
21 go. It is helpful. We do contend that Ms. Gersh was
22 essentially a captive audience.

23 THE COURT: Okay. Say you lose on the captive
24 audience. That the doctrine--the Court decides not to apply
02:16:52 25 that doctrine which is in fact, as you know, applied very

1 sparingly. Correct?

2 MR. DINIELLI: That's right, Your Honor.

3 THE COURT: So let's assume captive audience doesn't
4 work for you. What is your theory of liability?

5 MR. DINIELLI: Well, it still is the theory that we
6 allege under the intrusion into seclusion tort, Your Honor.
7 That doesn't necessarily require the application of the
8 captive audience doctrine.

9 And, in fact, the lead case that we cite and that was
02:17:18 10 discussed earlier, the *Rowan* against *United States Post*
11 *Office Department* case, which is the case about the mail
12 going into the home, was about things going into the home.
13 But there are other cases in which the right to be let
14 alone, which is the right that the court discussed in that
02:17:33 15 case, has been applied outside the home in places where
16 someone is not necessarily a captive audience.

17 There was a Second Circuit case which we did not cite in
18 our brief, Your Honor. It's called *Galella vs. Onassis*.
19 The cite is 487 F.2d 986. It's 2nd Circuit, 1973.

02:17:54 20 That was a case in which the claims were IIED, an
21 invasion of privacy, and the facts were this: There was a
22 paparazzo who was following Jackie Onassis' family and her
23 children. Popping up out of bushes, scaring them, following
24 them in a motor boat. Again, not in the home. No
02:18:16 25 discussion of whether she was a captive audience.

1 What happened there was the court balanced the right to
2 be let alone, which I said is the right that the court
3 discusses in the *Rowan* case, and balanced it against the
4 right to communicate or the right to gather news. Another
02:18:34 5 First Amendment right.

6 The Court said when we balance these things, we come out
7 in favor of the right to be let alone. And of particular
8 importance, Your Honor, in that case is that the court said
9 specifically because of the fact that the paparazzo was
02:18:52 10 bothering, following, and scaring the children of
11 Ms. Onassis, that that balance came out in favor of the
12 right to be let alone. We think that's highly instructive
13 here. That's an examination or an explanation as to why I
14 don't think strict application of the captive audience
02:19:09 15 doctrine is necessary to win on the intrusion into seclusion
16 tort.

17 THE COURT: And you are attempting to convince me
18 the intrusion into seclusion as discussed in that case, the
19 *Rowan* case, is applicable where we're talking about speech,
02:19:25 20 freedom of speech and association--

21 MR. DINIELLI: That's correct, Your Honor.

22 THE COURT: Any authority for that?

23 MR. DINIELLI: The principal right of issue was a
24 right derived from the freedom of the press, not freedom of
02:19:39 25 the speech. But it suggests that when First Amendment

1 concerns are at interest and the competing interest is the
2 right to be let alone, that there is a balancing to be done.

3 THE COURT: Do you think there is a difference
4 between the freedom of press embodied in the First Amendment
02:19:53 5 and an individual's right to free speech and association?

6 MR. DINIELLI: I can't come up with a reason why one
7 would be more important than the other, Your Honor.

8 THE COURT: Okay. But that's the only case you have
9 to cite me to sustain your position on this intrusion into
02:20:09 10 seclusion theory of liability?

11 MR. DINIELLI: Well, no, Your Honor. We cited cases
12 that stand for the proposition that, for example, telephone
13 calls into a person's home can constitute a violation, can
14 constitute that tort.

02:20:22 15 Our position is that--

16 THE COURT: Doesn't the captive audience come into
17 play in that situation? Isn't that what you've argued to
18 me?

19 MR. DINIELLI: It could, Your Honor. I don't think
02:20:31 20 it's a necessary element. I'm not understanding why that
21 would be necessary to make that point.

22 However, I would say that Ms. Gersh is captive to her
23 devices. She is a real estate agent. She has to answer her
24 phone. She has to answer messages.

02:20:47 25 THE COURT: Were all of the media of communication

1 that I asked Mr. Randazza about, all of those were publicly
2 available?

3 MR. DINIELLI: That's true, Your Honor; but the
4 disclosure of those is not necessarily the premise of the
02:21:03 5 tort in this case.

6 THE COURT: I understand that. I'm just asking you
7 a simple question, were they publicly available?

8 MR. DINIELLI: To my knowledge, they were.

9 THE COURT: All right.

02:21:11 10 MR. DINIELLI: Your Honor, I think that what the
11 plaintiffs--or, I'm sorry, the defendants are left with is
12 trying to argue, as I said before, Ms. Gersh is a public
13 figure somehow, or that the speech at issue relates to a
14 matter of public concern and is, therefore, entitled to some
02:21:29 15 sort of special First Amendment solicitude.

16 I'll take the matter of public concern first because I
17 think there was kind of an aligning of any analysis of why
18 what happened here and the speech at issue is purportedly a
19 matter of public concern.

02:21:44 20 First of all, not anything that the public is interested
21 in is necessarily a matter of public concern. Things are a
22 matter of public concern if they affect a large number of
23 people.

24 What's at issue here, and what started this troll storm
02:22:00 25 was not the larger issue of the views of Richard Spencer and

1 their heinousness or their righteousness.

2 What started the issue here was the allegation that my
3 client had put undue pressure on Sherry Spencer. So are
4 communications about that a matter of public concern? I
02:22:28 5 would suggest, Your Honor, that they are not. And the
6 *Snyder* case is the case to look at for this. The *Snyder*
7 case, as I recall, was the case about the picketing of the
8 soldier's funeral.

9 The Court there said--and I will say that that was a
02:22:42 10 case in which there was an IIED claim and an intrusion into
11 seclusion claim.

12 THE COURT: Why didn't the intrusion into seclusion
13 claim prevail there if it should prevail here?

14 MR. DINIELLI: Well, in that case, Your Honor, the
02:22:58 15 plaintiff had simply driven by the protest that was taking
16 place in a public place. He then went to the funeral. The
17 evidence was that he couldn't even hear the protestors when
18 he was at the funeral and he didn't even see or read the
19 signs. The evidence was he could see the tops of the signs
02:23:13 20 as he drove by.

21 Now, what the court in that case did was it said that
22 whether speech is on a matter of public concern depends upon
23 the content, the form, and the context. In other words,
24 what the court said, and this is a quote, "What was said,
02:23:28 25 where it was said, and how it was said."

1 Here, Your Honor, what was said? Well, it is true that
2 Mr. Anglin justified his troll storm as based on the fact
3 that my client purportedly had extorted Sherry Spencer. I
4 would submit that is not a matter of public concern. But
02:23:52 5 certainly the messages that were sent as a result, and we
6 hold him responsible for that under the substantial
7 assistance theory, they did not in many cases even relate to
8 that. They did not--

9 THE COURT: Sorry to interrupt you. But the
02:24:04 10 substantial assistance theory, where in the First Amendment
11 jurisprudence would I find that?

12 MR. DINIELLI: Your Honor, I'm not certain if we
13 cited a case in which that was invoked in the context of a
14 tort in which there was a First Amendment defense.

02:24:21 15 I think the *Claiborne* case and the description of the
16 three exceptions to the decision that there would be no
17 liability for those--

18 THE COURT: Well, let me interrupt again. Because
19 if we're going to talk about the *Claiborne* case, we
02:24:34 20 certainly will talk about the language used by the Supreme
21 Court in the *Claiborne* case. They did not use the term
22 "substantial assistance," correct?

23 MR. DINIELLI: That's correct, Your Honor.

24 THE COURT: Do you have any other First Amendment
02:24:46 25 jurisprudence that uses the term "substantial assistance"?

1 MR. DINIELLI: No, I don't.

2 THE COURT: I didn't think so.

3 So let's talk about the *Claiborne* case. What in your
4 mind constitutes authorized, ratified or directly
02:24:59 5 threatened? Does there have to be some sort of authority,
6 as in this case Mr. Anglin, over those individuals who may
7 engage in the speech that you consider to be tortious?

8 MR. DINIELLI: Your Honor, I don't think there has
9 to be any kind of legal authority. What we've alleged here
02:25:16 10 is that Mr. Anglin has built a website and a following in
11 which he's become notorious for launching these troll storms
12 in the past.

13 THE COURT: Understood, understood. It's just when
14 I read the terms authorized, ratified or directed, that
02:25:29 15 seems to conjure up some other legal principle such as
16 principal agency. Some sort--employer/employee. Some sort
17 of authority where the person is under my thumb. If the
18 person does not engage in the activity I'm authorizing and
19 directing or ultimately they do and I ratify that. Is there
02:25:48 20 any--

21 MR. DINIELLI: Well, Your Honor, I will admit that I
22 have not read any case that interprets that language from
23 *Claiborne* in that way.

24 THE COURT: Can you give me a case where any court
02:25:57 25 has interpreted that language?

1 MR. DINIELLI: The language from *Claiborne*, Your
2 Honor?

3 THE COURT: I'm talking about authorized, ratified
4 or directed. Because I will confess to you I've looked.
02:26:08 5 I'm struggling with understanding in what context I'm to
6 read those terms, because that is in fact--I mean, you do
7 rely upon two--I think you do. Your briefing wasn't
8 entirely clear. But is the plaintiff relying both upon the
9 first exception, which is the incitement?

02:26:28 10 MR. DINIELLI: No, we're not, Your Honor.

11 THE COURT: I didn't think so because it wasn't
12 argued. So you are relying on your theory of recovery on
13 authorized, ratified or directed, correct?

14 MR. DINIELLI: Yes, Your Honor. And our allegations
02:26:40 15 as to why he or how he authorized, ratified or directed
16 included, for example, the following, which is Exhibit 2 to
17 Mr. Anglin's moving papers, which is one of his first
18 articles. I believe it's his first article. And this is an
19 example of what we think constitutes directing the tortious
02:27:00 20 activity.

21 If anyone wants to follow along, this is Page 8 of
22 Exhibit 2. It's in Mr. Anglin's moving papers--or
23 opposition papers.

24 At the bottom. "Her Twitter at Gersh Tanya doesn't
02:27:23 25 appear to be active but her son has active accounts. You

1 can hit him up. Tell him what you think of his whore
2 mother's vicious attack on the community of Whitefish."

3 And then it names the son and gives his Twitter handle.

02:27:40

4 We contend, and certainly we think this should be given
5 the benefit of the doubt at the motion to dismiss stage,
6 that this constitutes direction.

02:27:58

7 It is also the case that Mr. Anglin's website published
8 a total of 30 articles. He also provided online discussion
9 forums. We allege that because he was the publisher, it is
10 reasonable to presume he knew what was in those discussion
11 forums. And there was discussion in those discussion forums
12 about what people were saying in their contacts to Ms. Gersh
13 and her family.

02:28:13

14 THE COURT: Who ultimately makes the determination
15 of whether Mr. Anglin authorized, ratified or directed?

16 MR. DINIELLI: Your Honor, I think that's a fact
17 question.

18 THE COURT: So a finder of fact?

19 MR. DINIELLI: That's correct.

02:28:23

20 THE COURT: All right. Any authority for that?

21 MR. DINIELLI: No.

22 THE COURT: It seems obvious to me, but I just
23 wanted to see --

24 MR. DINIELLI: I wish I could, but I don't.

02:28:33

25 Your Honor, could I cede some of my time to my colleague

1 to talk about the Intimidation Act?

2 THE COURT: You may.

3 MR. DINIELLI: Thank you.

4 MR. MORRISON: May it please the Court, John
02:28:53 5 Morrison, co-counsel for plaintiff Tanya Gersh.

6 There are three areas that I intend to discuss. I
7 understand the Court has focused on the First Amendment
8 issues. But the first is a notice issue. The second is the
9 sufficiency of the pleading under the Anti-Harassment Act.
02:29:14 10 And then the third is the First Amendment issues that have
11 been raised.

12 First on the notice issue, if I may. The Federal Rules
13 of Civil Procedure require a party challenging the
14 constitutionality of the state statute to give notice of the
02:29:29 15 constitutional question to the state attorney general of--

16 THE COURT: True.

17 MR. MORRISON: --5.1 under the Federal Rules of
18 Civil Procedure. And this court, Judge Christensen, in
19 *Skogen versus Kosola*, just last October dismissed a claim
02:29:43 20 because that notice was not given.

21 We have not seen any proof by defendants that that
22 notice was given here, and so we believe that that is an
23 initial bar to the constitutional challenge of this state
24 statute.

02:29:59 25 THE COURT: Okay.

1 MR. MORRISON: The second point has to do with the
2 statute itself and the sufficiency of our pleading.

3 The anti-intimidation statute is 27-1-1503(2), and it
4 creates a civil cause of action for essentially the same
02:30:16 5 conduct that is described in very similar words in the
6 anti-stalking statute in the criminal code. And it says
7 that, "An individual or organization who is attempting to
8 exercise a legally protected right and who is injured,
9 harassed, or aggrieved by a threat or intimidation has the
02:30:40 10 civil cause of action against the person engaging in that
11 behavior."

12 So in the first requirement the issue is whether Tanya
13 Gersh was attempting to engage in legally protected
14 activity. And the legally protected activity in this case
02:30:57 15 is the use of her telephone, the use of her e-mail, the use
16 of her texting and her voice mail, going to work, earning a
17 living, living in her community, practicing Judaism and
18 simply the right to be left alone. And so all of those
19 rights are at stake here.

02:31:17 20 And the next question becomes, was she injured, harassed
21 or aggrieved? And I believe that the pleadings have,
22 without question, created at least a fact issue with respect
23 to the degree of injury and emotional distress and so forth.

24 The last piece has overlap with the First Amendment
02:31:36 25 questions. And that is, was there a threat or intimidation?

1 And also overlapping into the First Amendment area is the
2 fact that the Montana Supreme Court has found with respect
3 to the anti-stalking statute that a communication can be
4 indirect. It's not necessary for a defendant under that
02:32:00 5 anti-stalking criminal statute to actually make the
6 communication directly to the victim if there is an intended
7 relay of that communication or a--or if the person provoking
8 the communication knows what's going to happen in terms of
9 the third party passing it on.

02:32:21 10 We cited that *State versus McCarthy* case. And in that
11 case I would submit to the Court that what allows Mr. Anglin
12 to be held responsible under the Anti-Intimidation Act for
13 the communications that came from the Internet trolls
14 directly to the Gershes is a very similar kind of standard
02:32:49 15 that would satisfy the authorize, ratify and direct
16 principle that the court was referring to with respect to
17 the First Amendment. And what it really comes down to is a
18 kind of foreseeability.

19 THE COURT: I'm not following. I understand
02:33:05 20 foreseeability, but I'm not following your argument that
21 when this court is to interpret what the United States
22 Supreme Court said in *Claiborne* about authorize, ratify or
23 direct. You are suggesting I look to Montana law to make
24 that determination?

02:33:17 25 MR. MORRISON: Not at all, Your Honor. But what I

1 am suggesting is that in order for us to prove our case
2 under the Anti-Intimidation Act, we will be introducing
3 proof that will satisfy the United States Supreme Court's
4 requirement of showing that Mr. Anglin did authorize, ratify
02:33:37 5 and direct this activity.

6 THE COURT: Well, it's possible the evidence you
7 ultimately may be allowed to put on would satisfy the
8 Montana statute but not necessarily the Supreme Court's
9 statement. Right? Do you agree with that?

02:33:49 10 MR. MORRISON: Yes, that's possible, but I think--

11 THE COURT: Okay.

12 MR. MORRISON: But I do believe that the evidence
13 that we're required to prove in order to satisfy that
14 Mr. Anglin is responsible for the 700-and-some
02:34:03 15 communications is very similar and goes a long way toward
16 establishing the authorize, ratify and direct.

17 As the Court pointed out, you know, 30 of these
18 communications that came from Mr. Anglin in his articles
19 were done after the first wave of attacks on Ms. Gersh, and
02:34:28 20 were along the lines of "Keep it up. It's working. Keep
21 after it. Continue to try to wipe out the scourge" and that
22 sort of thing. And we can quote those communications
23 directly. But we are going to show in connection with the
24 Anti-Intimidation Act that Mr. Anglin did in fact know what
02:34:54 25 was going to happen. He knew what was going to happen the

1 first time when he issued his commands and he knew--
2 certainly knew after the attacks had already started.

3 And essentially what he did was he launched an army or a
4 swarm of bees at the Gershes and exactly what he expected
02:35:19 5 happened. The conduct of Mr. Anglin, the particular words
6 that he used that constituted his launching of that army or
7 the swarm of bees are quoted in the Complaint. It's really
8 content neutral kind of language. "Let's hit 'em up. Ready
9 for an old-fashioned troll storm. Call these people up.
02:35:41 10 Send them a quick message. Make them feel the kind of
11 pressure that we feel. Take action. Stop by and tell her
12 in person what you think. Leave a review of her business on
13 Google with a note that it's a front for an extortion
14 racket. Call or stop by her husband's"--

02:35:59 15 THE COURT: I've read all the comments, all right?

16 The reason I focused upon the First Amendment issue is
17 because I didn't put a lot of stock in the Rule 12(b)(6)
18 motion as it applies to the Montana claims. But if you want
19 to talk yourself out of that, that's fine by me.

02:36:16 20 MR. MORRISON: I understand, Your Honor, and I won't
21 belabor all of those particular communications.

22 THE COURT: Good idea.

23 MR. MORRISON: We've also in the Complaint
24 specifically alleged causation. And I understand that the
02:36:30 25 Court is interested in this from the First Amendment

1 standpoint. But I think that our allegations also satisfy
2 that authorize, ratify and direct standard when we have
3 alleged that Mr. Anglin intended this result. He gave them
4 instruction and encouragement. His conduct was a
02:36:52 5 substantial factor in bringing about the harm. His comments
6 were designed to inflict distress on her. That attacks were
7 substan--

8 THE COURT: Are you arguing the First Amendment
9 point here?

02:37:04 10 MR. MORRISON: Well--

11 THE COURT: I understand--look, I understand what
12 the Montana statutes require. I understand there's a
13 question of fact, in my view. All right? I understand
14 particularly there's a question of fact under the Montana
02:37:17 15 statute and common-law as to the issue of causation and so
16 forth.

17 The big issue, of course, it's facing right now is the
18 First Amendment issue. And you are telling me that if you
19 satisfy the Montana common-law and/or the Montana statute,
02:37:31 20 you've therefore satisfied and defeated the First Amendment
21 defense. Is that what you are telling me?

22 MR. MORRISON: Not because that's true necessarily;
23 but in this particular case the elements are such that when
24 we prove them, I believe that we will have also satisfied
02:37:47 25 the First Amendment requirements.

1 THE COURT: You are entitled to your belief.

2 MR. MORRISON: And then with respect to the
3 overbreadth issue that was raised by the defendant.

02:38:05

4 The application of this doctrine is, as the United
5 States Supreme Court has said, manifestly strong medicine.
6 It has been employed by the court sparingly and only as a
7 last resort. Facial overbreadth has not been invoked when
8 limiting construction has been or could be placed on the
9 statute.

02:38:21

10 What I would note is that the anti-intimidation statute
11 has inherent within it certain limiting elements. The
12 plaintiff must be exercising a legally protected right. The
13 plaintiff must prove that she was injured, harassed or
14 aggrieved. And the defendant's conduct must amount to a
15 threat or intimidation.

02:38:41

16 Also I would note with respect to that, that because
17 this is a tort action the plaintiff has to prove that the
18 plaintiff was damaged. And in proving that she suffered
19 damages and that she suffered an injury in fact, all of
20 those requirements on the plaintiff go to inherently
21 limiting the application of this law that prescribes this
22 certain kind of conduct.

02:39:00

23 How am I doing time wise?

24 THE COURT: You've got about two minutes.

02:39:25

25 MR. MORRISON: I would just note that the Ninth

1 Circuit and other courts of appeal have recognized that a
2 host of the same kinds of activity that we're talking about
3 here may be proscribed consistent with the First Amendment.
4 In the Ninth Circuit's *Osinger* case, in 2014, finding the
02:39:47 5 defendant repeatedly calling, text messaging, sending social
6 media message to the victim was a course of conduct under
7 the anti-stalking statute and it was unprotected by the
8 First Amendment.

9 THE COURT: No doubt about that. It was a direct
02:40:02 10 communication. If it was a direct communication by
11 Mr. Anglin to Ms. Gersh, I wouldn't have any quarrel with
12 that. We're not talking about that here, are we?

13 MR. MORRISON: Well, no, Your Honor; except in order
14 for us to satisfy the state requirement of Mr. Anglin
02:40:18 15 violating the Anti-Intimidation Act, we will be proving that
16 he was essentially directly culpable for the kinds of
17 communications that came in the swarm of bees that attacked
18 the Gershes.

19 THE COURT: Understood.

02:40:31 20 MR. MORRISON: And that's all I have at this time.
21 Thank you.

22 THE COURT: All right, thank you.

23 Mr. Randazza, you might want to begin with the question
24 I meant to ask you--I appreciate Mr. Morrison bringing it
02:40:43 25 up--but your failure to satisfy Federal Rule of Civil

1 Procedure 5.1 by notifying the State of Montana via the
2 attorney general as to your constitutional challenge.

3 MR. RANDAZZA: We failed to do so, Your Honor.

4 THE COURT: All right.

02:40:56

5 MR. RANDAZZA: Therefore at best today and as
6 applied challenge. And I would say, if Your Honor wishes me
7 to jump to a different place.

8 THE COURT: Yes, I do.

9 MR. RANDAZZA: Where would you like me to--

02:41:07

10 THE COURT: Oh, the reason being--I can't say you
11 can't bring it up in the future. But that aspect of your
12 motion challenging the constitutionality, consistent with
13 Judge Christensen's decision and other decisions by this
14 court, it hasn't been satisfied. Until it is, the Court
15 will not address that issue. And then the question becomes,
16 have you waived that under Rule 12.

02:41:23

17 MR. RANDAZZA: Yes, sir. I have not researched
18 that, Your Honor.

19 THE COURT: All right.

02:41:33

20 MR. RANDAZZA: I will say, though, that it appears
21 as though we're still discussing whether this is a matter of
22 public concern. I wish to address some of the comments that
23 my friend made.

24 You know, we were talking a bit about *Snyder v. Phelps*.

02:41:47

25 And in *Snyder versus Phelps*, just like here, we have a

1 sympathetic plaintiff but we have a greater, larger matter
2 of public concern that unfortunately sucks this sympathetic
3 plaintiff into the maelstrom of abusive language. Abusive,
4 caustic and vehement language.

02:42:09 5 However, if we look at the Complaint when we want to
6 talk about this matter of public concern, Ms. Gersh, under
7 the allegations in this Complaint, and I believe they are
8 consistent with the actual facts, is that Ms. Gersh became a
9 public figure because of, at best, Ms. Spencer. Perhaps
02:42:27 10 prior to that. And I would say that prior to that her
11 involvement in various civic organizations and involvement
12 in the movement to move Ms. Spencer out of town would make
13 her a public figure.

14 But let's just draw the line as brightly as we can. And
02:42:42 15 at Paragraph 25 of the Complaint it discusses that Mrs.
16 Spencer published an article about her experience with
17 Ms. Gersh and everything in that statement may be false.
18 Ms. Spencer may be lying, then they should sue her for
19 defamation. I don't represent her.

02:43:00 20 But they then allege the day after Anglin published his
21 views, Paragraph 26 of the Complaint.

22 How all of this is a matter of public concern is
23 addressed at Paragraph 16 and forward, Paragraphs 51, 52 and
24 53 of the Complaint. It discusses how the presence of
02:43:19 25 Ms. Spencer is a huge matter of concern for this community.

1 THE COURT: So it's your position if I have a
2 conversation with someone and that someone publishes an
3 article in the local newspaper, even if totally false, and
4 then I become the subject of a troll storm, I'm a public
02:43:38 5 figure for purposes of First Amendment analysis? That's
6 what you just told me, correct?

7 MR. RANDAZZA: I find that a little confusing, so if
8 I could reiterate to make sure I've got you correct.

9 THE COURT: Well, what you told me, if I understand,
02:43:51 10 is Ms. Gersh may have become a public figure, limited public
11 figure, because of what Ms. Spencer did.

12 MR. RANDAZZA: Correct, yes.

13 THE COURT: So my question seemed fairly
14 straightforward. You are telling me or it is your position
02:44:05 15 that I could have a private communication with an
16 individual. That individual could take the contents--the
17 supposed contents, even if the statements are false, of my
18 private conversation, publish that in a local newspaper and
19 then I can become the subject of a troll storm and those
02:44:20 20 people are protected by First Amendment.

21 MR. RANDAZZA: No. There is an intervening fact
22 that I want to throw in there.

23 THE COURT: That's what I want to hear.

24 MR. RANDAZZA: What I would say is in that scenario,
02:44:29 25 yes, you are not a United States District Judge in this

1 scenario. You are a private figure.

2 THE COURT: Oh, yeah, true, true. Absolutely
3 private figure. I shouldn't use me. I'll use Ms. Puhrmann
4 here, if she will allow me.

02:44:42

5 MR. RANDAZZA: You don't mind? Yes, somebody can
6 publish completely defamatory, take out an ad in the local
7 newspaper or publish a website about her that is 100 percent
8 total lies.

02:44:58

9 THE COURT: So I can unwittingly become--Ms. Puhrmann
10 could unwittingly become a public figure for purposes--
11 limited public figure for purposes of First Amendment
12 analysis?

02:45:11

13 MR. RANDAZZA: Yes. And then the next day somebody
14 else in another publication writes about those allegations.
15 They are false. Now, they may have a defamation liability
16 at that point if they have failed to satisfy the actual
17 malice test, but she's already there. She's already crossed
18 the line into public figure land when someone else made her
19 a public figure.

02:45:27

20 Same as Ms. Spencer. At worst, for my argument in
21 Paragraph 25, that's when Ms. Gersh, at least, admits to
22 being a public figure. Ms. Spencer is already a public
23 figure.

02:45:43

24 Remember in your hypothetical we don't define who the
25 person is who wrote that article, but let's say it's David

1 Duke. Let's say it's some other public figure. Let's say
2 it's Orlando Bloom. Whoever it is, some public figure
3 writes about you in an article, even in a completely
4 defamatory way, yeah, you've unfortunately been dragged out
02:46:01 5 of the shadows into the light of public figure land.

6 So if Ms. Spencer falsely attributed those to Gersh,
7 then that is--that is a matter between her and Ms. Spencer.
8 Not a matter between her and the press. Not a matter
9 between her and my client's reporting on what happened
02:46:23 10 there.

11 Now, Your Honor had a question for me before, that I was
12 speaking from memory. But I want to confirm that these
13 e-mails published were, at Paragraph 89, were e-mail or
14 phone number. And I believe during their argument they also
02:46:39 15 admitted that these were already publicly available.

16 Now, I find the discussion of the *Onassis* case--it took
17 me a little by surprise, but I am somewhat familiar with
18 that case. And the right to be let alone is not something
19 that you take in a complete vacuum. While these people were
02:46:59 20 public figures they had a right to be left alone as far as
21 the examples that he gave: The paparazzi popping out of the
22 bushes, being followed constantly. Yeah, then the person
23 doing that could be held liable. And then the person
24 authorizing or ratifying that--authorizing, ratifying or
02:47:20 25 directing that might be held liable.

1 So if I'm running a tabloid newspaper and I send out my
2 reporter and I say "hide in the bushes, use a--hide in their
3 backyard, wait next to their--in their boat to take pictures
4 of them," I do have that degree of agency control over them.

02:47:37 5 But, on the other hand, let's say a paparazzo does such
6 a thing. And then I am simply publishing a newspaper about
7 the Onassises or a newspaper article and I say, "Good job,
8 I'm really glad that these photos are there. I hope to see
9 more of them." There is no connection between me as that
02:47:59 10 tabloid publisher and my competition. So I can't be the one
11 who's authorizing, ratifying or directing. Those words
12 don't also legally mean encouraging, cheered, or applauded.
13 So we can be delighted about certain results without
14 being--without authorizing them or ratifying them.

02:48:19 15 THE COURT: Let me interrupt you for a moment and
16 ask you. Would you agree that there are some factual
17 questions here, such as whether Ms. Gersh is in fact a
18 limited public figure, just for openers, that counsels
19 against this matter being resolved on a Rule 12(b)(6) motion
02:48:37 20 to dismiss?

21 MR. RANDAZZA: Not if I look at the Complaint, Your
22 Honor. Because the Complaint does state, in fact at length,
23 about how this is this great public controversy surrounding
24 Ms. Spencer being in this town. This is already a matter of
02:48:53 25 public concern when we look at Paragraph 16 and a few

1 following that. But look at Paragraph 16, 51, 52, 53. They
2 are already discussing--I'll pull it up here, Your Honor.

3 By way of background, Whitefish residents' discontent
4 with the Spencer family had been simmering for years and
02:49:17 5 reached a fever pitch when the "Hail Trump" video of Richard
6 Spencer went viral. The video's viral release prompted
7 discussion among Whitefish residents. The majority flatly
8 reject Richard Spencer's hateful ideology. So this goes on
9 and on to discuss this great public controversy in Whitefish
02:49:37 10 that already takes place.

11 And then we jump to Paragraph 25 where Ms. Spencer--
12 about two weeks later, without any warning to Ms. Gersh,
13 Ms. Spencer published a blog post on the website "Medium"
14 and alleged in her post that Ms. Gersh tried to threaten and
02:49:54 15 extort her into selling her building. The day after,
16 Mr. Anglin began posting articles in the "Daily Storm"
17 re-parroting Ms. Spencer's allegations. So I don't see
18 where we have a factual dispute as to whether she's a
19 limited public figure.

02:50:10 20 THE COURT: So cite me your best case supporting
21 your proposition that Annie Puhrmann here can unwittingly
22 become a limited public figure.

23 MR. RANDAZZA: New York--I don't want to say it was
24 *New York Times*, but the party, and it was Butts, B-U-T-T-S.
02:50:32 25 There was a--I believe it was a football coach that was

1 drawn into a public controversy. Any case where you cite a
2 vortex public figure or a limited purpose public figure or
3 involuntary public figure. I'm sure if you--

4 THE COURT: All right. So ultimately I take it it's
02:50:55 5 your position with your opening comments that because we as
6 a society hold our First Amendment rights dearly,
7 particularly free speech and association, that we simply
8 have to deal, unfortunately, with acts of cowardice. And
9 even though those acts of cowardice have happened in this
02:51:20 10 case, I'm not pointing to any particular individual, but
11 that, coupled with the anonymity of the Internet, that makes
12 this all the more real.

13 MR. RANDAZZA: Your Honor, it's the price we pay for
14 living in a free society. Yes, Your Honor. You know, there
02:51:39 15 is--as much as we might look at this and, you know, I do
16 empathize with her. But you could say that this was--this
17 group of cowards who did hide behind their anonymity and
18 attack her, they harassed her. But *Rodriguez vs. Maricopa*
19 *County Community College District* says there is no
02:52:00 20 categorical harassment exception to the First Amendment free
21 speech clause. Even those cowards we have to put up with,
22 yes. And although we might have a regulation prohibiting
23 harassment and intimidation that might not be overbroad, it
24 has to be one that threatens or endangers the health or
02:52:20 25 safety of another. Not simply one where people are sharing

1 their, admittedly, bigoted and objectionable views with
2 someone. But even then if I were here representing that
3 group of cowards, I would still argue the same point of law.

4 But I think I am on more solid ground representing
02:52:40 5 Mr. Anglin, because Mr. Anglin's statements were simply not
6 part and parcel of his readers, followers, or these people
7 who simply followed like lemmings. We don't know.

8 There is no allegation that any of these people had any
9 contact with Mr. Anglin beforehand. We had no allegation
02:52:58 10 that Mr. Anglin knew what they were going to do. Yes, I
11 would lose credibility here if I thought Mr. Anglin thought
12 he was just shouting into a void.

13 THE COURT: Well, is there a factual question that a
14 light might be shed on through the discovery process
02:53:16 15 regarding what Mr. Anglin knew subsequent to his initial
16 publications, such as in the chat room, et cetera, that
17 would constitute directing, ratifying?

18 MR. RANDAZZA: No, Your Honor. And there is a very
19 clear reason for that. You want to talk about the chat
02:53:35 20 rooms. If people are talking in the chat rooms, first of
21 all, there is no allegation that Mr. Anglin monitored those
22 chat rooms. Even if he did, I don't see it making a legal
23 or constitutional difference. And he would not be liable
24 for anything in those chat rooms even if those chat rooms
02:53:54 25 are under his control.

1 THE COURT: Didn't he provide the forum?

2 MR. RANDAZZA: Yes, Your Honor, he provided the
3 forum.

02:54:06

4 THE COURT: So if through the forum he is made aware
5 of the fact that there have been this bombardment, if you
6 will, or release of the bees as characterized by
7 Mr. Morrison, and some of those communications were
8 threatening, and yet he publishes similar articles with the
9 same directions with the information? I won't say
10 directions. Same comments.

02:54:22

11 MR. RANDAZZA: Sure. I don't think that that
12 constitutionally changes anything, Your Honor.

13 THE COURT: Is it ratification?

02:54:32

14 MR. RANDAZZA: It is not ratification, Your Honor.
15 Ratification, it implies that there is some kind of agency
16 control here. It implies that, perhaps, if they worked for
17 him, perhaps if they were his agents--

18 THE COURT: So maybe I asked you this before, but
19 bear with me.

02:54:47

20 Do you have any authority that helps me draw that
21 conclusion that there has to be some principal/agency
22 relationship, employment relationship, such that that
23 language utilized by the Supreme Court in *Claiborne*,
24 essential to saying the person authorized, ratified and
25 directed, that there has to be actual authority over the

02:55:06

1 individual to whom you--over the individual that made these
2 statements?

3 MR. RANDAZZA: No greater authority than *Claiborne*
4 itself, Your Honor. No, I do not.

02:55:19 5 THE COURT: All right.

6 MR. RANDAZZA: But I do have authority for--at least
7 to tie up this thread of this comment--this discussion
8 forum. There is no allegation--this is a new argument that
9 they raised in their presentation, but I'm prepared to at
02:55:33 10 least partially address it.

11 47 U.S.C. Section 230 immunizes the operator of an
12 interactive computer service for any content thereupon.
13 This is part of the ironically named Communications Decency
14 Act.

02:55:53 15 THE COURT: I'm familiar with it.

16 MR. RANDAZZA: So, Your Honor, just if I may, just
17 to conclude. I think that when somebody is advocating for
18 the free speech rights of somebody like this--and, truly,
19 somebody in your position, I think the 4th Circuit Judge
02:56:16 20 Robert King said it quite well in his opinion on *Snyder v.*
21 *Phelps*. "The judges defending the constitution must
22 sometimes share their foxhole with scoundrels of every sort,
23 but to abandon the post because of the poor company is to
24 sell freedom cheaply. And it's a fair summary of history to
02:56:36 25 say that the safeguards of liberty have often been forged in

1 controversies involving not very nice people."

2 While that may be the case here, Your Honor, I think
3 we--

02:56:48

4 THE COURT: I agree wholeheartedly with the
5 statement. My function here is to determine whether it fits
6 into any of the Supreme Court decisions, most importantly
7 *Claiborne*, which we're talking about.

8 MR. RANDAZZA: Thank you for your thoughtfulness and
9 your questions, Your Honor.

02:57:00

10 THE COURT: Thanks to all of you. I'll issue an
11 opinion as soon as practical. Court stands adjourned.

12 (End of Proceedings at 2:57 p.m.)
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C E R T I F I C A T E

[illegible]

I, Julie M. Lake, RDR, CRR, CSR, Freelance Court Reporter for the State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause;

I further certify that the foregoing pages of this transcript represent a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on
this the 20th day of April, 2018.

Julie M Lake
Julie M. Lake, RDR, CRR, CSR
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State of Montana, residing in
Missoula, Montana.